

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 39574  
Issued to: Thomas J. McKNIGHT

DECISION OF THE VICE COMMANDANT ON APPEAL  
UNITED STATES COAST GUARD

2264

Thomas J. McKNIGHT

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 11 December 1980, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's Operator's License for two months on nine months' probation, upon finding him guilty of negligence. The specification found proved alleged that while serving as Operator on board the Tug Holly under authority of the license above captioned, on or about 8 March 1980, Appellant negligently absented himself from the wheelhouse of the said vessel, leaving the responsibilities of navigation of the said vessel and its tow to an unlicensed deckhand, Woodard Willis, thereby contributing to the said vessel's collision with the N.C. Highway #58 Bridge across the Atlantic Intracoastal Waterway at approximately Mile 225.9.

The hearing was held at Wilmington, North Carolina, on 28 August 1980.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and four exhibits.

In defense, Appellant offered in evidence two exhibits, and the testimony of two witnesses, his own testimony included.

After the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending his license for a period of two months on nine months' probation.

The entire decision was served on 22 December 1980. Appeal was timely filed on 12 January 1981 and perfected on 25 June 1981.

FINDINGS OF FACT

On 8 March 1980, Appellant was serving as Operator on board the tug HOLLY and acting under authority of his license while the vessel was underway in the Atlantic Intracoastal Waterway in the vicinity of Mile 225.

On the date in question, HOLLY was pushing a construction barge which was fitted with a crane. The crane was secured to starboard of the midship line, and had a 62.5 foot boom attached. The boom was capable of many positions, by alteration of its vertical and horizontal orientation to the control cab. The precise position of the boom at the time in question is not precisely established by the record.

Appellant was the only licensed person aboard HOLLY, and was directing the navigation and control of the flotilla as it approached the N.C. Highway No. 58 Bridge. The bridge is of the fixed type with a vertical clearance of sixty-five feet at mean high water.

The flotilla approached the bridge at a speed of about six knots, with following winds and current. The tide was at less than mean high water. While still about one mile from the bridge, Appellant decided to check his computations to insure adequate clearance would exist for passage under the bridge. Accordingly, he departed the pilot-house and proceeded to a deckhouse on the barge, leaving Woodard Willis at the wheel. Mr. Willis is unlicensed, but had some limited experience steering the HOLLY flotilla prior to the time in question. On an earlier occasion he had successfully steered the flotilla through the same bridge, when Appellant was not aboard. Another unlicensed member of the crew was stationed on the barge to provide steering directions by hand signal to Willis, since the barge, its deckhouse, and the crane obstructed the view from the pilothouse.

Appellant, after consulting materials available in the barge deckhouse, satisfied himself that the crane boom would safely clear the bridge span. He remained there on the barge, to study charts of the area beyond the bridge.

Unfortunately, Appellant's determination that a safe passage was possible was incorrect. Although the flotilla passed under the bridge close to the center of the span, the end of the boom struck the bridge and holed the bridge span. The boom was bent under the impact, traveled backwards, and fell upon the stern of the tug. No personnel injuries resulted from the casualty.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the

Administrative Law Judge. Appellant asserts that:

I. There is no evidence of record upon which to base a finding of fact as to the type of bridge involved or its vertical clearance;

II. The evidence does not demonstrate that actual direction and control of the vessel was left to unlicensed personnel;

III. The Administrative Law Judge erred in his determinations of the credibility of witnesses and evidence.

IV. Appellant successfully rebutted the presumption of negligence which arose as a result of the allision;

V. The evidence was insufficient to prove negligence.

#### OPINION

##### I

Appellant challenges the sufficiency of the evidence which led to the Administrative Law Judge's finding that the bridge in question was a fixed bridge with a vertical clearance of 65 feet above mean high water. This assertion is without merit. The Investigating Officer's Exhibit 4, and extract of Chart 11541, clearly indicates that the bridge in question is a fixed span having a 65 foot vertical clearance. Mr. Robert L. Spence, Bridge Maintenance Superintendent of the North Carolina Department of Transportation, also testified that the design and construction of the bridge provided a 65 foot vertical clearance at mean high water. Further, Appellant acknowledge that he had utilized the charted clearance of 65 feet when calculating the clearance of the crane. Record at 94. No evidence of any sort was available on the record which contradicted the evidence presented to establish the vertical clearance of the bridge. The sufficiency of the evidence presented, when measured against 46 CFR 5.20-95(b), leads me to conclude that the Administrative Law Judge was correct in his finding.

##### II

The testimony of those aboard the HOLLY flotilla on the date in question is consistent with respect to Appellant's conduct prior to the casualty. Five to ten minutes, and approximately one mile from the bridge, Appellant left the pilot house and went into a compartment on the barge. From his position on the barge, Appellant had only a limited view of the flotilla, its components, and the bridge the flotilla was approaching. Communication with

the wheelhouse was only possible by shouting over the sound of the tug's engines to attract the attention of the helmsman. Appellant gave only the most general instructions to the unlicensed helmsman when he quit the pilothouse; to continue on their present course. The unlicensed helmsman was left in control of the movement of the vessel, assisted only by another unlicensed deckhand who provided signals from a vantage point on the barge to compensate for the restricted view from the pilothouse.

Licensed operators are required aboard vessels such as HOLLY to insure that a minimum level of experience and competence is possessed by the person actually directing and controlling the movements of the vessel. As prior decisions have stated, this does not mean that the operator must physically steer the flotilla; it does mean he must be in a position to provide timely corrective action if a hazardous situation develops. In light of this, Appellant's action in departing the pilothouse for 5 to 10 minutes as the flotilla approached a bridge, with minimally experienced personnel actually controlling the movement of the vessel, is not explicable by his "gut feeling" that he should check his clearance computations again. Given the circumstances of this case, and the layout of the barge, I conclude that Appellant could not execute his duty as operator after placing himself in a position where he could not observe the progress of the flotilla as it approached the bridge. Since Appellant could not direct and control the vessel from his remote position, and made no pretense of doing so, he had relinquished direction and control of the vessel to unlicensed personnel.

### III

The Administrative Law Judge expressly rejected Appellant's evidence related to the calculation which convinced Appellant that sufficient clearance existed for the boom to clear the bridge. Decision and Order at 9. Appellant asserts that no evidence was introduced to contradict the computation he made. Determinations of credibility will not be disturbed on appeal unless clearly erroneous. Decisions on Appeal Nos. 2108 & 2097. In the instant case, the computation performed during the proceeding by Appellant indicated that no allision could have occurred. Based on the manufacturer's data sheets, Appellant determined that the height of the boom above the surface of the water was sixty-one to sixty-two feet. It is clear from the record that the accuracy of the computation is dependant upon the accuracy of the entry values, i.e. length of the boom, radius of the boom, and the height of grade above the surface of the water. It was the reference values which were found to be incredible, not the computations based on the values provided by Appellant.

Since it was established that the allision occurred at a state of water "substantially" below the reference datum, the available clearance was actually greater than 65 feet. Appellant's testimony; Record at 101-02. Based on these facts, a conflict does exist in the evidence, which the Administrative Law Judge properly resolved. The factors affecting the height of the boom could not have been accurately evaluated and an allision still have occurred. There is ample basis in the record for the decision to reject Appellant's testimony related to these factors, since no alternative explanation for the allision appears in the record.

#### IV

It is well settled that an allision with a charted object gives rise to a rebuttable presumption of negligence against the operator of a vessel. Appeal Decision No. 2244; NTSB Order EM-81, \_\_\_\_\_ NTSB \_\_\_\_\_ (1980). The effect of the presumption is to shift the burden of going forward with evidence to rebut the presumption to Appellant. The only evidence adduced by Appellant concerned the calculation of the clearance, discussed above, and evidence to the effect that the allision would have occurred even had he been present in the pilothouse. Appellant argues on appeal that either the bridge was less than 65 feet above mean high water, or the documents upon which he relied were in error. These assertions, alone, do not constitute rebuttal evidence. No evidence in support of either of these assertions was adduced. In fact, all evidence regarding bridge clearance uniformly proclaims a 65 foot clearance. Even Appellant's witness stated that the bridge clearance markers indicated 65 feet of clearance as the flotilla approached the structure. Record at 81-83.

The suggestion that the manufacturer's chart, Respondent's Exhibit A, might be in error is not sufficient to rebut the presumption. The chart functions as an analog, and its accuracy was subject to verification, since the equipment was in the control of Appellant. Since the immutable laws of trigonometry and geometry would detect errors in the chart, Appellant should have identified the errors on the record to rebut the presumption. This not being the case, it is unnecessary to belabor the point that such a chart is only as accurate as the entry values; if Appellant erred in his determination of the height of grade above the surface of the water, or the radius of the boom, the allision becomes easily explicable.

#### V

Appellant's final contention, that negligence is not proven by the evidence in this case, is predicated on his belief that the presumption of negligence was rebutted. Since Appellant is

incorrect on that point, it follows that the effect of the presumption must be examined. Concisely stated, an rebutted presumption suffices to establish a prima facie case of negligence. Appeal Decisions Nos. 2113, 1200, 1131. In the absence of appropriate rebuttal evidence, the permissible inference of negligence is sufficient to sustain the judgement of the Administrative Law Judge. See Appeal Decision No. 2177 (and cases cited therein).

#### CONCLUSION

The possession of an operator's license, and the exercise of the privileges attached thereto, carry a responsibility for assurance of the safe navigation of a vessel. It is the duty of a person acting under a license to ascertain that a planned route can be safely traversed. This includes, inter alia, advance determination of the state of tides and currents, clearance from obstructions, and the possession of appropriate navigational aids. In the instant case, it also included a duty to supervise the unlicensed personnel in such a manner that the direction and control of the flotilla would be provided by the licensed operator. While Appellant asserted that his mere presence in the pilothouse could not have prevented this accident, I am not persuaded that vigilant application of his greater experience and ability might not have averted this casualty, if he had been at the conn or on deck, as the flotilla approached the bridge. In any event, Appellant has proffered no evidence sufficient to rebut the presumption of negligence arising from the allision. Vessels properly directed and controlled do not in the ordinary course of events allide with charted objects.

#### ORDER

The order of the Administrative Law Judge dated at New York, New York on 11 December 1980, is AFFIRMED.

R. H. SCARBOROUGH  
VICE ADMIRAL, U. S. COAST GUARD  
Vice Commandant

Signed at Washington, D.C., this 8th day of September 1981.